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TRANSMITTAL OF APPEAL BRIEF (Large Entity)

Docket No.

NL 000434 (18457)

In Re Application Of: V. P. Buil, et al.

Application No. 09/932,070	Filing Date August 17, 2001	Examiner Luke S. Warren	Customer No. 23389	Group Art Unit 2167	Confirmation No. 5575
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Invention: SYSTEM FOR BROWSING A COLLECTION OF INFORMATION UNITS

COMMISSIONER FOR PATENTS:

Transmitted herewith in 1 is the Appeal Brief in this application, with respect to the Notice of Appeal filed on January 14, 2005

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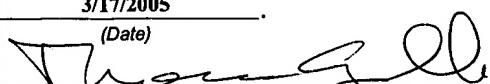
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant: V. P. Buil, et al.

Art Unit: 2167

Serial No.: 09/932,070

Examiner: Luke S. Wassum

Filed: August 17, 2001

Docket: NL000434 (18457)

For: SYSTEM FOR BROWSING
A COLLECTION OF
INFORMATION UNITS

Dated: March 17, 2005

Conf. No.: 5575

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APPEAL BRIEF

Sir:

I. INTRODUCTION

Pursuant to 35 U.S.C. § 134 and 37 C.F.R. § 41.37, entry of this Appeal Brief in support of the Notice of Appeal filed January 14, 2005 (and received in the Patent Office on January 19, 2005) in the above-identified matter is respectfully requested. This paper is submitted as a brief setting forth the authorities and arguments upon which Appellants rely in support of the appeal from the Final Rejection of Claims 1-13 in the above-identified patent application on October 19, 2004.

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II. STATEMENT OF REAL PARTY OF INTEREST

The real party of interest in the above-identified patent application is Koninklijke Philips Electronics N.V.

III. STATEMENT OF RELATED PROCEEDINGS

There are no pending appeals or interferences related to this application to Appellant's knowledge.

IV. STATEMENT OF SUPPORTING EVIDENCE

No affidavits, documents, or other evidence is being entered into the record in support of this Appeal.

V. STATEMENT OF CLAIM STATUS AND APPEALED CLAIMS

A. Claim Status

Claim 1 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 2 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 3 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 4 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 5 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 6 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al. and to U.S. Patent Application No. 2003/0229537 to Dunning et al.

Claim 7 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al. and to U.S. Patent Application No. 2003/0229537 to Dunning et al.

Claim 8 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al. and to U.S. Patent Application No. 2003/0229537 to Dunning et al.

Claim 9 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 10 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in

independent form including all of the limitations of the base claim and any intervening claim.

Claim 11 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 12 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

Claim 13 stands rejected based on 35 U.S.C. § 103(a) and U.S. Patent Nos. 5,616,876 to Cluts and 5,969,283 to Looney et al.

B. Appealed Claims

Claims 1-13 are appealed, a clean copy of which are attached hereto in Appendix A.

VI. STATEMENT OF AMENDMENT STATUS

The claims were not amended in the Response to the Final Rejection filed November 23, 2004.

VII. STATEMENT/EXPLANATION OF INVENTION

The present application, U.S. patent application Serial No. 09/932,070 was filed on August 17, 2001, originally included Claims 1-13. A Preliminary Amendment was filed with the application to remove multiple dependencies from claims 3, 5, 6, 9, 10, and 13.

In an Official Action dated March 1, 2004, the Examiner objected to the Drawings, Specification and claim 11. The Examiner further rejected claims 9 and 10 under 35 U.S.C. § 112, second paragraph. The Examiner still further rejected Claims 1-5, 9 and 11-13 under 35 U.S.C. § 102(b) as being anticipated by Cluts (U.S. Patent 5,616,876). Lastly, the Examiner rejected Claims 6-8 under 35 U.S.C. § 103(a) as being unpatentable over Cluts in view of Dunning et al. (U.S. Patent Application Publication 2003/0229537).

In a Response under 37 C.F.R. § 1.111, filed May 25, 2004, the drawings, the specification and claim 11 were amended to address the objections thereof. Claims 9 and 10 were amended to address the rejections thereof under 35 U.S.C. § 112, second paragraph.

Furthermore, the rejections of claims 1-9 and 11-13 under 35 U.S.C. §§ 102(b) and 103(a) were traversed. However, independent claims 1 and 11 were amended to more particularly set forth the claimed invention and to highlight the differences between the claimed invention and the cited prior art.

In the Final Official Action, issued October 19, 2004, the Examiner withdrew the previous grounds of rejection under 35 U.S.C. § 102(b) in favor of rejections under 35 U.S.C. § 103(a). Specifically, the Examiner rejected claims 1-5, 9,

and 11-13 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,616,876 to Cluts (hereinafter "Cluts") in view of U.S. Patent No. 5,969,283 to Looney et al., (hereinafter "Looney"). Additionally, the Examiner rejected claims 6-8 under 35 U.S.C. § 103(a) as being unpatentable over Cluts and Looney and further in view of U.S. Patent Application No. 2003/0229537 to Dunning et al., (hereinafter "Dunning"). Applicants traversed the Examiner's rejections without amendment to the claims in a response under 37 CFR 1.116 filed on November 23, 2004.

Subsequent to an Advisory Action issued on December 23, 2004, an Appeal Brief was filed on January 14, 2005.

Consequently, Claims 1-13 are the claims on appeal. A copy of the rejected claims is attached hereto in the Appendix.

The invention with respect to claim 1 comprises a system (e.g., Figure 1) for browsing a collection of information units (e.g., page 5, lines 1-3), comprising presentation means (e.g., page 5, lines 14 and 24-26 and reference numeral 108 in Figure 1) for presenting at least one of said information units, and attribute means (e.g., page 5, lines 4-6, 9-14, and 22-32 and reference numeral 102 in Figure 1) for associating a respective one of said information units with an attribute value (Id.), wherein the system comprises

random selection means (e.g., page 5, lines 9-14 and reference numeral 103 in Figure 1) for automatically randomly selecting and presenting a unit whose attribute value meets a criterion, the selection and presentation being made without interaction by a user (e.g., page 5, lines 22-32).

The invention with respect to claim 2 comprises a system as claimed in claim 1, wherein said system comprising user-operable hold means (e.g., page 5, lines 1-14 and 22-24, page 6, lines 12-25; reference numerals 101 and 107 in Figure 1; and reference numerals 206-209 in Figure 2) for holding an attribute value of a currently selected unit as a criterion for subsequent selections.

The invention with respect to claim 3 comprises a system as claimed in claim 1, wherein said attribute value being defined with respect to a first attribute, said attribute means being adapted to determine a set of valid attribute values for a further attribute in dependence on said criterion (e.g., page 5, lines 1-14 and 24-32).

The invention with respect to claim 4 comprises a system as claimed in claim 3, wherein said first attribute representing a genre of said information units and said further attribute representing a sub-genre of said information units (e.g., page 5, lines 27-32).

The invention with respect to claim 5 comprises a system as claimed in claim 1, wherein said information units comprising audio and/or video information (e.g., page 5, lines 1-9 and page 8, lines 17-22).

The invention with respect to claim 6 comprises a system as claimed in claim 1, wherein the system further comprising user-operable skip means (e.g., page 7, line 16 to page 8, line 16 and Figure 3 in general) for controlling the random selection means to abort the presentation of the currently selected unit and to skip to a randomly selected alternative unit whose attribute value meets said criterion.

The invention with respect to claim 7 comprises a system as claimed in claim 6, wherein said skip means being capable of removing at least one criterion in dependence on a mode of operation of said skip means (e.g., page 7, line 16 to page 8, line 16 and Figure 3 in general).

The invention with respect to claim 8 comprises a system as claimed in claim 7, wherein said removing of said criterion being determined by an iterated and/or prolonged operation of said skip means (e.g., page 7, line 16 to page 8, line 16 and Figure 3 in general).

The invention with respect to claim 9 comprises a system as claimed in claim 1, wherein the attribute means being adapted to determine a distance between a pair of attribute

values, the random selection means being capable of selecting a unit from units whose attribute values are different from attribute values of an earlier selected unit (e.g., page 6, line 33 to page 7, line 11).

The invention with respect to claim 10 comprises a system as claimed in claim 1, wherein the system comprising display means for displaying a simulation of a slot machine (e.g., page 5, line 33 to page 6, line 25 Figure 2 in general) having at least one column (e.g., reference numerals 201-204 in Figure 2) comprising a plurality of randomly selectable attribute values, wherein each of the at least one column corresponds to an attribute, and activation means for activating the random selection of an attribute value in at least one of the at least one column, an operation of said simulated slot machine representing said random selection, and each cylinder of said slot machine representing a set of valid attribute values for an attribute (e.g., page 5, line 33 to page 6, line 25 and Figure 2 in general).

The invention with respect to claim 11 comprises a method of browsing a collection of information units (e.g., page 5, lines 1-3), comprising a step of presenting an information unit from said collection and a step of associating a respective information unit with an attribute value for at least a first attribute, wherein the method comprises a step of

automatically randomly selecting and presenting, without interaction by a user, a unit from said collection of information units whose attribute values meet a criterion for said first attribute (see Page 5, lines 1-32 and Figure 1 in general).

The invention with respect to claim 12 comprises a method as claimed in claim 11, further comprising a step of user operably holding an attribute value of a currently selected unit as a criterion for subsequent selections (e.g., page 5, lines 1-14 and 22-24, page 6, lines 12-25; reference numerals 101 and 107 in Figure 1; and reference numerals 206-209 in Figure 2.

The invention with respect to claim 13 comprises a computer program product for causing a programmable device, when executed on said device, to constitute a system as claimed in claim 1 (e.g., page 8, lines 28-34).

VIII. STATEMENT/LIST OF EACH GROUND FOR REVIEW

1. **The Rejection of claims 1-5, 9, and 11-13, on appeal, under 35 U.S.C. § 103, as being unpatentable over Cluts in view of Looney is improper.**

A. CLAIMS 1 and 11

In response to the Official Action issued on March 1, 2004, Applicants argued that Cluts fails to teach randomly selecting an information unit for presentation to a user. The

claims were also amended to clarify such a distinction. In response, the Examiner combined Cluts with Looney to "address this new limitation" (see page 11, lines 6-8 of the Final Official Action). In this regard, the Examiner argued that "It would have been obvious to one of ordinary skill in the art at the time of the invention to include a randomization function as claimed, since such functionality is desirable to prevent the monotony of being presented the same songs in the same order, and further because such functionality has been well known and common in the art for many years, such as randomize function CD players." (see page 5, lines 9-13 of the Final Official Action).

Applicants disagree with the Examiner's suggestion and motivation for the combination of the Cluts and Looney references and respectfully submit that such combination is improper and must be withdrawn for at least the reasons set forth below.

The U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit") has consistently and repeatedly stated the legal test applicable to rejections under 35 U.S.C. § 103(a). Recently (*In re Rouffet*, 47 USPQ2d 1453 (Fed. Cir., July 15, 1998)), the Court stated:

[V]irtually all [inventions] are combinations of old elements. Therefore an Examiner may often find every element of a claimed invention in the prior art. Furthermore, rejecting patents solely

by finding prior art corollaries for the claimed elements would permit an Examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat the patentability of the claimed invention.

Such an approach would be "an illogical and inappropriate process by which to determine patentability." To prevent the use of hind sight based on the invention to defeat patentability of the invention, this court requires the Examiner to show a motivation to combine the references that create the case of obviousness. The Board [of Appeals] did not, however, explain what specific understanding or technological principle within the knowledge of one of ordinary skill in the art would have suggested the combination. Instead, the Board merely invoked the high level of skill in the field of the art. If such a rote indication could suffice to supply a motivation to combine, the more sophisticated scientific fields would rarely, if ever, experience a patentable technical advance. Instead, in complex scientific fields, the Board could routinely identify the prior art elements in an application, invoke the lofty level of skill, and rest its case for rejection. To counter this potential weakness in the obviousness construct **the suggestion to combine requirements stands as a critical safeguard against hindsight analysis and rote application of the legal test for obviousness.**

In re Rouffet, 47 USPQ2d 1457-58 (Fed. Cir., July 15, 1998) (citations omitted, emphasis added).

More recently, the Federal Circuit again dealt with what is required to show a motivation to combine references under 35 U.S.C. § 103(a). In this case the court reversed the decision of the Board of appeals stating:

[R]ather than pointing to specific information in Holiday or Shapiro that suggest the combination..., the Board instead described in detail the similarities between the Holiday and Shapiro references and the claimed invention,

noting that one reference or the other-in combination with each other... described all of the limitations of the pending claims. Nowhere does the Board particularly identify any suggestion, teaching, or motivation to combine the ... references, nor does the Board make specific- or even inferential-findings concerning the identification of the relevant art, the level of ordinary skill in the art, the nature of the problem to be solved, or any factual findings that might serve to support a proper obviousness analysis.

In re Dembiczak, 50 USPQ2d 1614, 1618 (Fed. Cir., April 28, 1999) (citations omitted).

Thus, from both *In re Rouffet* and *In re Dembiczak* it is clear that the Federal Circuit requires a specific identification of a suggestion, motivation, or teaching why one of ordinary skill in the art would have been motivated to select the references and combine them. This the Examiner has not done. The Examiner includes two reasons for the suggestion and motivation to combine the Cluts device with the randomization disclosed in Looney.

(1) such functionality (randomization) is desirable to prevent the monotony of being presented the same songs in the same order; and

(2) such functionality has been well known and common in the art for many years, such as randomize function CD players.

In re Rouffet and *In re Dembiczak* make it clear that this alone is not enough.

In fact, the facts of *In re Dembiczak* are analogous to the facts of the present invention. In this case, the patentee claimed a decorative plastic trash or leaf bag that is orange in color and has facial indicia on it such that when filled and closed it takes the form of a pumpkin with a face thereon. Among the cited references made by the patent office were:

- Handbook which taught school teachers how to make crepe paper jack-o-lanterns and a paper bag pumpkin by stuffing a bag with newspapers, painting it orange, and painting facial features on it with black paint; and
- Conventional trash bags.

The Board of Appeals affirmed the Examiner's Final Rejection holding that the claims are obvious in light of the conventional trash bags in view of the handbook references. To justify this rejection the Board stated that "the [handbook references] would have suggested the application of ... facial indicia to the prior art plastic trash bags." The Federal Circuit pointed out that rather than pointing to specific information in the handbook references that suggest the combination with the conventional trash bags, the Board instead described in detail the similarities between the handbook references and the claimed invention, noting that one reference or the other, in combination with each other and the

conventional trash bags, describe all of the limitations in the pending claims (See, *In re Dembiczak* at page 1618).

The Board failed to show how this reference-by-reference and limitation-by-limitation analysis demonstrated how the handbook references teach or suggest their combination with the conventional trash bags to yield the claimed invention (*Id.*). The Board did not identify any teaching, suggestion, or motivation to combine the handbook references with the conventional trash bags, nor did it make specific, or even inferential- findings concerning the identification of the relevant art, the level of ordinary skill in the art, the nature of the problem to be solved, or any other factual findings that might serve to support a proper obviousness analysis (*Id.*).

Similarly, in the present application the Examiner combines a reference teaching a system for selecting music on the basis of subjective content with a reference teaching a conventional randomization to defeat the patentability of the claimed invention without identifying how one of the references teaches or suggests that it be combined with the other. Furthermore, where a feature is not shown or suggested in the prior art references themselves, the Federal Circuit has held that the skill in the art will rarely suffice to show the missing feature. *Al-Site Corp. v. VSI International Inc.*, 174

F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999) (Rarely, however, will the skill in the art component operate to supply missing knowledge or prior art to reach an obviousness judgment).

Additionally, with regard to item (1) above, the Examiner argues that such functionality (randomization) is desirable to prevent the monotony of being presented the same songs in the same order. Although such is most likely the object of a conventional randomization, such as in Looney, the same is not an objective of the present invention. As stated on page 1, lines 25-27 of the present application, the objective of the present invention is to provide a system and method which enables a user to easily explore the collection of information units by providing a system comprising a random selection means for randomly selecting a unit for presentation whose attribute value meets a criterion. Such a combination is nowhere disclosed or suggested in Cluts or Looney. Therefore, those skilled in the art would not be motivated or suggested to look to either Cluts or Looney to solve the objective addressed by the present invention.

Furthermore, with regard to item (2) above, the Examiner argues that the randomization functionality has been well known and common in the art for many years, such as randomize function CD players. Applicants respectfully submit that such a factor is irrelevant in an obviousness analysis.

The only test to be applied when considering obviousness is whether there is a motivation or suggestion to combine the references. As discussed above, the Examiner has not made such a showing, either in the references themselves or in the art in general.

Thus, Applicants respectfully submit that the Examiner, without identifying a suggestion, motivation, or teaching for combining the references, has used impermissible hindsight in rejecting the claims under 35 U.S.C. § 103(a). As discussed above, the Federal Circuit in *In re Rouffet* stated that virtually all inventions are combinations of old elements. Therefore an Examiner may often find every element of a claimed invention in the prior art. To prevent the use of hindsight based on the invention to defeat patentability of the invention, the Examiner is required to show a motivation to combine the references that create the case of obviousness. Applicants respectfully submit that the Examiner has not met this burden.

In light of the state of the law as set forth by the Federal Circuit and the Examiner's lack of specificity with regard to the motivation to combine the cited references, the applicant respectfully submits that the rejections for obviousness under 35 U.S.C. § 103(a) lack the requisite motivation and must be withdrawn.

B. CLAIMS 2-5, 9, 12 and 13

Claims 2-5, 9, 12 and 13 being dependent upon claims 1 and 11 are thus at least allowable therewith.

2. **The Rejection of claims 6-8, on appeal, under 35 U.S.C. § 103, as being unpatentable over Cluts and Looney and further in view of Dunning is improper.**

Claims 6-8 being dependent upon claim 1 are thus at least allowable therewith.

IX. CONCLUSION

Based on the above arguments and remarks, Appellants respectfully submit that the claims of the instant invention on appeal are not obvious in light of Cluts, Looney and Dunning, either individually or in combination. Consequently, the rejections of the claims based on such references are in error. In view of the remarks submitted hereinabove, the references applied against Claims 1-13 on appeal do not render those claims unpatentable under 35 U.S.C. § 103. Thus, Appellants submit that the § 103 rejections are in error and must be reversed.

APPENDIX

CLAIMS ON APPEAL: CLAIMS 1-13
Application Serial No. 09/932,070

1. (Rejected) A system for browsing a collection of information units, comprising presentation means for presenting at least one of said information units, and attribute means for associating a respective one of said information units with an attribute value, wherein the system comprises random selection means for automatically randomly selecting and presenting a unit whose attribute value meets a criterion, the selection and presentation being made without interaction by a user.
2. (Rejected) A system as claimed in claim 1, said system comprising user-operable hold means for holding an attribute value of a currently selected unit as a criterion for subsequent selections.
3. (Rejected) A system as claimed in claim 1, said attribute value being defined with respect to a first attribute, said attribute means being adapted to determine a set of valid attribute values for a further attribute in dependence on said criterion.
4. (Rejected) A system as claimed in claim 3, said first attribute representing a genre of said information units and said further attribute representing a sub-genre of said information units.
5. (Rejected) A system as claimed in claim 1, said information units comprising audio and/or video information.

6. (Rejected) A system as claimed in claim 1, the system further comprising user-operable skip means for controlling the random selection means to abort the presentation of the currently selected unit and to skip to a randomly selected alternative unit whose attribute value meets said criterion.

7. (Rejected) A system as claimed in claim 6, said skip means being capable of removing at least one criterion in dependence on a mode of operation of said skip means.

8. (Rejected) A system as claimed in claim 7, said removing of said criterion being determined by an iterated and/or prolonged operation of said skip means.

9. (Rejected) A system as claimed in claim 1, the attribute means being adapted to determine a distance between a pair of attribute values, the random selection means being capable of selecting a unit from units whose attribute values are different from attribute values of an earlier selected unit.

10. (Objected) A system as claimed in claim 1, the system comprising display means for displaying a simulation of a slot machine having at least one column comprising a plurality of randomly selectable attribute values, wherein each of the at least one column corresponds to an attribute, and activation means for activating the random selection of an attribute value in at least one of the at least one column, an operation of said simulated slot machine representing said random selection, and each cylinder of said slot machine representing a set of valid attribute values for an attribute.

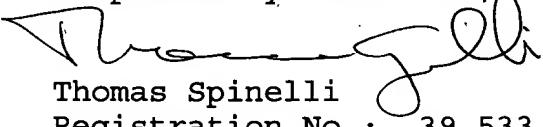
11. (Rejected) A method of browsing a collection of information units, comprising a step of presenting an information unit from said collection and a step of associating a respective information unit with an attribute value for at least a first attribute, wherein the method comprises a step of automatically randomly selecting and presenting, without interaction by a user, a unit from said collection of information units whose attribute values meet a criterion for said first attribute.

12. (Rejected) A method as claimed in claim 11, further comprising a step of user operably holding an attribute value of a currently selected unit as a criterion for subsequent selections.

13. (Rejected) A computer program product for causing a programmable device, when executed on said device, to constitute a system as claimed in claim 1.

The Commissioner is hereby authorized to charge any additional fees or credit any overpayment in connection herewith to Deposit Account No. 19-1013/SSMP.

Respectfully submitted,


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